92-982

Supreme Court, U.S.
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No. 92-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH A. MOHWISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 1992

QUESTIONS PRESENTED

(1) May an appellate court properly affirm a conviction for conducting a Continuing Criminal Enterprise, 21 U.S.C. § 848, which requires proof that the defendant managed or supervised the participation of at least five others, by scouring the record and relying on its own identification of five individuals, at least three of whom were never claimed by the government as the defendant-petitioner's subordinates?

(2) Prior to the specific prohibition of such conduct by Congress in late 1986, were the laws under which the petitioner was convicted for structuring currency transactions to evade a reporting requirement, 18 U.S.C. §§ 2(b) and 371, used in connection with 31 U.S.C. §§ 5313 and 5322, too vague to support such convictions?

(3) Did the court of appeals flatly defy this Court's decision in Jeffers v. United States, 432 U.S. 137, 154-58 (1977), when, despite the government's concession of the point in its brief, the court refused after affirming the CCE conviction to order vacation of the applicant's lesser-included conviction for conspiracy under 21 U.S.C. § 846?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Joseph A. Mohwish and the United States). Bill J. Patrick, Delmus G. Gross, Kathy Mohwish and Sue Bell Sheets were appellants in consolidated cases below arising out of the same trial. Patrick and Gross petitioned separately for writs of certiorari (Patrick, No. 92-324; Gross, No. 92-269); those petitions were denied. See 113 S.Ct. 376 (Oct. 19, 1992).

2. The Circuits are divided on the question whether, prior to the enactment of the Money Laundering Control Act of 1986, the statutes used by the government to prosecute individuals for structuring currency transactions so as to cause banks not to file Currency Transaction Reports were unconstitutionally vague. 22

3. The court of appeals defied this Court's holding in Jeffers v. United States, 432 U.S. 137, 154-58 (1977), when it refused to vacate petitioner's conviction for drug conspiracy after upholding the CCE conviction. 26

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH A. MOHWISH respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 20, 1992, affirming his convictions for Continuing Criminal Enterprise and structuring currency transactions.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed on May 20, 1992, is published as United States v. Patrick, 965 F.2d 1390 (6th Cir. 1992). It is Appendix B to this petition. There is no published opinion of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 20, 1992. Appendix A. The Court of Appeals' Order denying petitioner's petition for rehearing with suggestion for rehearing in banc was entered on July 6, 1992. Appendix C. By Order dated September 24, 1992, under Docket No. A-253, Justice Stevens granted petitioner's application under Rule 13.2 for an extension of time within which to file this petition for writ of certiorari, to and including December 4, 1992. Appx. D. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Prior to November 18, 1988, 21 U.S.C. § 846 provided:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

After its amendment by the 1984 Comprehensive Crime Control Act and the Anti-Drug Abuse Acts of 1986, but before its further amendment as of November 18, 1988, 21 U.S.C. § 848 provided, in pertinent part:

> **Continuing criminal enterprise Penalties; forfeitures.**
>
> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if

the defendant is an individual, ... and to the forfeiture prescribed in section 853 of this title ....

* * * *

"Continuing criminal enterprise" defined.

(d) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such a violations is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which a person obtains substantial income or resources.

Suspension of sentence and probation prohibited.

(e) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July

15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

The Bank Secrecy Act, provides, in part:

> (a) when a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction ....

31 U.S.C. § 5313.

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter ... shall be fined ..., imprisoned ..., or both.
>
> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter ..., while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned not more than 5 years, or both.

31 U.S.C. § 5322.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall ... be deprived of life, liberty, or property, without due process of law; ...."

STATEMENT OF THE CASE

This petition arises from a case involving an alleged conspiracy to distribute cocaine and marijuana and to launder the proceeds in Kentucky between 1981 through mid-1987.

a. Procedural History

After a month-long (20 day) jury trial in the United States District Court for the Eastern District of Kentucky (Karl S. Forester, U.S.D.J., presiding), petitioner James A. Mohwish was convicted on August 14, 1989, on 23 counts of an

indictment charging him with conducting a Continuing Criminal Enterprise ("CCE"), 21 U.S.C. § 848; conspiracy to distribute controlled substances, id. § 846; conspiracy, inter alia, to cause the nonfiling of Currency Transaction Reports (CTRs) and to file false tax returns, 18 U.S.C. § 371; numerous counts of structuring currency transactions to evade a reporting requirement, 18 U.S.C. § 2(b), 31 U.S.C. §§ 5313, 5322; and three counts of filing false tax returns.[1] Co-defendant Bill J. Patrick was also convicted on the CCE count and of many other offenses.

On October 25, 1989, petitioner received a 20-year sentence, consisting

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1. Petitioner was found Not Guilty on Count 5 (a particular marijuana distribution conspiracy), and Counts 31 and 32 (money laundering charged under 18 U.S.C. § 1957). His wife, Kathy Mohwish, was acquitted on all counts.

of 20 years (nonparolable) for CCE, 20 years concurrent for the § 846 conspiracy, five years concurrent on Count 13 (the § 371 conspiracy), three years concurrent on some of CTR counts and five years concurrent on the others, and three years concurrent on the each of the tax counts. Eight separate special assessments were imposed, totaling $200, but the court imposed no fine.

On appeal, sub nom. United States v. Patrick, 965 F.2d 1390 (6th Cir., filed May 20, 1992), the Sixth Circuit reversed petitioner's structuring convictions on 16 substantive CTR counts[2] (and the co-defendant Patrick's CCE conviction). Appx. B. The court otherwise affirmed,

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2. The court of appeals found no evidence that the principal (the bank) that petitioner "caused" to fail to file proper CTRs, 18 U.S.C. § 2(b), had acted "knowingly," as the court held was required.

however, including both the CCE and § 846 drug conspiracy counts, and one count (15) of causing failures to file a CTR on or about December 31, 1983, and the related § 371 (Ct. 13) conspiracy. Rehearing was denied, Appx. C, over petitioner's claim that of the five persons identified by the court of appeals as having been "managed" by him, so as to find the evidence sufficient on the CCE count, at least three had never been so identified by the government before, during or after the trial. Thus, he contended, his conviction and nonparolable 20-year sentence had been affirmed on factual grounds never presented to the jury.

The jurisdiction of the court below under Rule 14.1(i). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the

indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within ten days of the entry of the judgment of sentence. Fed.R.App.P. 4(b).

b. Statement of Facts

The jury found, as alleged by the government at trial, that petitioner and Bill Patrick were partners in the running of a cocaine and marijuana business, in which petitioner was principally responsible for laundering the profits.[3] The conspirators used Delmus Gross's car dealership to launder funds, as well as petitioner's holding company and a window

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3. The repeated assertion of the court below that "Mohwish ... stored cocaine" for Patrick, Appx. B2, B8, has no basis in the record, nor did the government so contend at trial or in the court below.

firm called Season Sash. Petitioner was convicted for conspiring to cause, and on one occasion for causing the Union Bank & Trust Co. to fail to file CTRs for large currency deposits.

On numerous occasions, Gross received large cash payments from petitioner or one of his companies, which he deposited as if they were the proceeds of auto sales and then wrote equivalent checks to petitioner or one of his companies. Gross instructed his bookkeeper to put less than $10,000 on each deposit. On one occasion, underlying the affirmed conviction on Count 15, a bank vice president, Maynard, accepted for safekeeping over the Christmas holiday a bag that Gross said belonged to petitioner. The bag contained $100,000 in cash. Shortly after the money was returned to him, Gross sent it back to

the bank with instructions to issue 11 cashiers checks totaling $100,000, structured to avoid the reporting requirement. Maynard complied, believing the scheme to be illegal.

REASONS FOR GRANTING THE WRIT

1. The decision below disregards this Court's precedents prohibiting an appellate court from affirming a criminal conviction on a factual theory not presented to the jury.

The government's evidence tended to show that petitioner supervised the money laundering activities of a drug conspiracy. To convict him of conducting a Continuing Criminal Enterprise ("CCE"), the "kingpin" statute, however, the government had to prove that in committing a series of Title 21 drug offenses he acted in concert with at least five other persons, with respect to whom he occupied a position of organizer, super-

visor or manager. Before trial, petitioner requested a Bill of Particulars naming the five or more persons he was said to have managed. The prosecution responded with a pretrial memorandum stating that petitioner and co-defendant Patrick:

> directed numerous individuals in drug distribution and money laundering including co-defendants Gross and Kathy Mohwish as well as William Lawson, James Meyer, Charles Johnson, Fletcher Haralson, Joyce Haralson, Alice Bishop, Kenny Patrick, Gregory Fender and David L. Maynard, among others.

Although the list did not distinguish those attributed to petitioner as "supervisees" from those attributed to Patrick, the district court refused any further Bill of Particulars.

In closing argument, the prosecution urged the jury to find petitioner guilty on the CCE charge because he was an

"organizer or supervisor" of "each and every subordinate" in the § 846 drug conspiracy. XIX Tr. 48. Finally, in its appellate brief, the government contended that the requirement of five or more supervisees was satisfied by naming ten individuals who acted "in concert" with petitioner, noting that "A number of individuals were involved in the exchange of cash for checks, goods, and services, including Kathy Mohwish, Delmus Bunt Gross, David Maynard, Ray Butler, and Elmer Haas, Jr." Gov't Br. 44-45. The government did not suggest how these individuals were involved with petitioner, as required by 21 U.S.C. § 848(d)(1)(A),[4] in a continuing series of

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4. This provision is cited as it was in effect in the latter part of the time involved in this case, that is, between 1986 and 1988. The provision cited in text is now codified at 21 U.S.C. § 848(c)(1)(A).

violations "of this subchapter," that is, a series of controlled substances violations.[5] Moreover, the government did not even attempt to demonstrate how petitioner managed, organized or supervised each of these persons.

In any event, none of these offers corresponded with the list of subordinates on which the court of appeals relied. First, for various compelling

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5. The only drug violation that the money laundering participants could have been said to have committed would be the conspiracy under 21 U.S.C. § 846. (Gross, however, was acquitted of this specific charge by the same jury at petitioner's trial. For this additional reason, he, like Kathy Mohwish, should not have been counted.) Membership in the conspiracy is but a single offense, and does not make out their participation in a "continuing series" of Title 21 offenses, however. Title 31 CTR offenses do not count, because they do not arise under "this subchapter," as stated in § 848(d). This blatant point of insufficiency was not raised below, but should be noticed here as plain error requiring summary vacation of the petitioner's CCE conviction.

legal and factual reasons, the court below eliminated Kathy Mohwish (who was acquitted of membership in the conspiracy), Appx. B12-13, and Butler and Haas (because they were "innocent dupes"), Appx. B13. This left only two (Gross, the auto dealer, and Maynard, the banker) as managed or organized by petitioner. The court below nevertheless affirmed by ruling that Bill Patrick managed his son, Kenny (notwithstanding Patrick's acquittal on the substantive count charging this), and a subordinate, Lancaster (who had never appeared in any of the prosecutor's lists). Then, the court ruled that "Mohwish organized Patrick." Appx. B19. This conclusion was supported by the unexplained assertion that "the evidence indicates that it was Mohwish ... who controlled Patrick," apparently because it was petitioner "who

owned or controlled the corporations, supervised the money laundering, and received a larger share of the proceeds." Appx. B20. And having concluded that petitioner "controlled" Patrick, the court then attributed to him Patrick's supervisees, Kenny and Lancaster. Id. Thus was reached on appeal the minimum number of five subordinates.

Although the lower court's conclusion is unsupported by the evidence, the petitioner recognizes that such insufficiency alone would not justify this Court in granting certiorari. Rather, the point is that the decision of the court below rests on a factual theory never presented to the jury.

> [T]he right to a jury trial is [not] satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any

> theory they please simply because the facts necessary to support the theory were presented to the jury.

McCormick v. United States, 500 U.S. ---, 114 L.Ed.2d 307, 324 n.8 (1991); accord, id. at 336 (Stevens, J., dissenting). See also, e.g., Chiarella v. United States, 445 U.S. 222, 235-36 (1980); Dunn v. United States, 442 U.S. 100, 106 (1979) (all holding that appellate court may not affirm on fact-bound theory not presented to factfinder below).

The rule recently reiterated in McCormick, but ignored below, is not merely one of supervisory power. 114 L.Ed.2d at 324 n.8. The Due Process Clause does not permit a conviction to be entered at trial or to be affirmed on appeal on a basis not charged. To allow otherwise would be to defeat completely the right of notice of the charges and the opportunity to defend, the most

fundamental attribute of procedural due process, as well as the more specific guarantees of the Sixth Amendment. Rabe v. Washington, 405 U.S. 313 (1972) (per curiam).

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). Due process does not permit appellate affirmed "on a charge that was never made." Id.

The court below apparently fell into error by mistakenly viewing its task as searching the record to see whether any rational jury could have found a basis for conviction from among all the possible combinations of five persons

mentioned during the trial. Cf. Sochor v. Florida, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (June 8, 1992); Griffin v. United States, 502 U.S. ---, 112 S.Ct. 466, 116 L.Ed.2d 371 (Dec. 3, 1992). But that principle applies only where the theory selected by the appellate court as a basis for affirmance is one of those that has been presented to the jury. This case was never presented on the basis that petitioner "managed" or "controlled" Bill Patrick. The case on appeal was therefore governed by McCormick, not Griffin.

The lower court's judgment and opinion also conflicts (at least) with the Third Circuit's view that a CCE defendant, in the absence of clear information from another source, is entitled to a binding bill of particulars on the identity of the five supervisees. See

United States v. Rosa, 891 F.2d 1063, 1065-67 (3d Cir. 1989) (and cataloging cases to the same effect). Pretrial notice is of no use if the conviction can later be affirmed on an entirely different basis.

For all these reasons, this Court should grant Joseph Mohwish's petition for certiorari and reverse the judgment of the United States Court of Appeals for the Sixth Circuit to the extent that it affirmed petitioner's conviction for conducting a Continuing Criminal Enterprise.

2. The Circuits are divided on the question whether, prior to the enactment of the Money Laundering Control Act of 1986, the statutes used by the government to prosecute individuals for structuring currency transactions so as to cause banks not to file Currency Transaction Reports were unconstitutionally vague.

The court below affirmed one of petitioner's convictions under 31 U.S.C. §§ 5322, 5313 and 18 U.S.C. § 2(b) for causing the Union Bank & Trust to fail to file a Currency Transaction Report for the structured $100,000 transaction in December 1983. The court also upheld petitioner's conspiracy conviction under 18 U.S.C. § 371, one objective of which was the achievement of that result. Appx. B8. In the Third or Eighth Circuits, however, these convictions would have been reversed, for those courts have held this use of the statutes to violate the due process rule against vagueness. This Court should grant the

petition to resolve that conflict in the Circuits.

As part of the Anti-Drug Abuse Act of 1986, Congress enacted 31 U.S.C. § 5324(3), which prohibits the willful structuring of currency transactions for the purpose of evading a reporting requirement.[6] While there are many difficult and controversial issues of construction arising under that statute, at least it makes clear that the act of willful structuring is prohibited. Prior to the effective date of that law, however (i.e., January 27, 1987), it was not at all clear whether a bank customer committed an offense by deliberately

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6. The 1986 Act also created two other money laundering statutes, 18 U.S.C. §§ 1956 and 1957. Petitioner was acquitted of the only charges in this case arising under those provisions, and they are therefore not involved in the case at this time.

avoiding engaging in a currency transaction involving more than $10,000 at any one time, even though the customer intended to deal in that much currency in toto. The Bank Secrecy Act, in this respect, bound only "financial institutions," not customers. To punish suspected money laundering activity involving currency transactions, then, the government turned to a variety of theories involving inchoate offenses and accessorial liability, such as conspiracy and aiding and abetting principles. The legal effectiveness of that strategy is at issue here.

The court of appeals sustained two of the applicant's convictions for these offenses where the Third Circuit's decision in United States v. Mastronardo, 849 F.2d 799 (3d Cir. 1988), and the Eighth Circuit's decision in United

States v. Larson, 796 F.2d 244 (8th Cir. 1986), would require their reversal. See John K. Villa, Banking Crimes § 6.05[4]-[a], at 6-70 to -71 (1992 rev.) (discussing conflict in the circuits under pre-1987 law). The involvement of Maynard, the bank officer, makes no difference to the due process analysis. Mastronardo, 849 F.2d at 802 n.9.[7] In Mastronardo, a stockbroker, agent for a "financial institution," was convicted as a co-conspirator in the structuring activity, yet all the conspiracy convictions were reversed on due process vagueness grounds, as the law then provided no clear duty to aggregate fragmented pieces of a large transaction.

For this reason as well, this Court should grant the writ of certiorari and

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7. All the less does it matter that Maynard, the banker, thought their structuring conduct was illegal.

reverse the judgments of conviction on Counts 13 and 15.

3. The court of appeals defied this Court's holding in Jeffers v. United States, 432 U.S. 137, 154-58 (1977), when it refused to vacate petitioner's conviction for drug conspiracy after upholding the CCE conviction.

In Jeffers v. United States, 432 U.S. 137, 154-58 (1977), this Court held that the Double Jeopardy Clause bars separate punishments on convictions for Continuing Criminal Enterprise (CCE) and conspiracy to violate the controlled substances laws. Cf. Garrett v. United States, 471 U.S. 773 (1985) (declining to extend Jeffers to convictions on CCE's underlying series of substantive offenses). The government conceded in the court below that petitioner's conspiracy conviction under 21 U.S.C. § 846, on which he received a concurrent

prison sentence and an additional Special Assessment, should have been vacated. Nevertheless, the court below failed to do so, even on rehearing.[8]

If no greater relief is granted, this petition should be granted, the judgment of affirmance should be summarily vacated and the case remanded with instructions to vacate the conspiracy conviction.

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8. Ironically, the lower court cited Jeffers twice for othe propositions favorable to the appellant-petitioner. Appx. B13, B14.

CONCLUSION

For each of the foregoing reasons, petitioner MOHWISH prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit affirming his convictions and sentences.

Respectfully submitted,
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By: PETER GOLDBERGER
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JAMES H. FELDMAN, JR.

Attorneys for Petitioner

December 4, 1992.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89-6410: 89-6411: 89-6412: 89-6443:
89-6444: 91-5075: 91-5076: 91-5243

FILED

UNITED STATES OF AMERICA,

MAY 20 1992

Plaintiff - Appellee,

v. **LEONARD GREEN, Clerk**

BILL J. PATRICK (89-6410/6443; 91-5075);
DELMUS G. GROSS (89-6411); JOSEPH A.
MOHWISH (89-6412/6444; 91-5076);
KATHY MOHWISH (91-5243);
SUE BELL SHEETS (91-5243),

Defendants - Appellants.

Before: Kennedy and Suhrheinrich,
Circuit Judges; Engel, Senior
Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky at Covington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the CCE conviction of Bill Patrick is reversed and remanded with instructions to vacate. The CTRA convictions of Delmus Gross and Joseph Mohwish brought under Counts 14 and 16-30 are reversed and remanded with instructions to vacate. IT IS FURTHER ORDERED that the judgments of the district court are affirmed in all other aspects.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

7/21/92
Issued as Mandate: (89-6412/6444/91-5076 only)

A True Copy

COSTS: No Costs

Attest:

Filing Fee .....$
Printing .....$
Total .....$

s/ Diane Schnur
Deputy Clerk

APPENDIX B

Nos. 89-6410/6411/6412/6443/6444;
91-5075/5076/5243

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

BILL J. PATRICK (89-6410/6443; 91-5075);
DELMUS G. GROSS (89-6411); JOSEPH A.
MOHWISH (89-6412/6444; 91-5076);
KATHY MOHWISH (91-5243);
SUE BELL SHEETS (91-5243),
Defendants-Appellants.

[published at 965 F.2d 1390]

ON APPEAL from the United States District Court for the Eastern District of Kentucky [Karl S. Forester, U.S.D.J.]

[Argued Oct. 1, 1991]
Decided and Filed May 20, 1992
[Rehearing and Rehearing En Banc Denied July 6, 1992]

Before: KENNEDY and SUHRHEINRICH, Circuit Judges and ENGEL, Senior Circuit Judge.

SUHRHEINRICH, Circuit Judge, delivered the opinion of the court, in which ENGEL, Senior Circuit Judge joined. KENNEDY, Circuit Judge, delivered a separate concurring opinion.

SUHRHEINRICH, Circuit Judge. Joseph Mohwish and Bill Patrick ran a prosperous drug distribution and money laundering business. Delmus Gross's car dealership was used to launder the drug proceeds. It was Patrick's job to secure cocaine and marijuana and to locate buyers. Mohwish coordinated the drug operation with Patrick and stored cocaine. Mohwish also owned a holding company for several of his other corporations, including a window manufacturing firm called Season Sash. Mohwish and Gross used these corporations on behalf of their money laundering activity.

Gross and Mohwish appeal convictions for acting as accomplices to violations

of the Currency Transactions Reporting Act ("CTRA"), 31 U.S.C. §§ 5313, 5322. Gross, Mohwish, and Patrick appeal convictions for conspiracy to violate the CTRA. This same trio requests a new trial because of juror misconduct and an assortment of evidentiary and other errors. Mohwish and Patrick appeal convictions for operating a continuing criminal enterprise ("CCE"). Kathy Mohwish and Sue Bell Sheets challenge a forfeiture order entered pursuant to Joseph Mohwish's CCE conviction. We affirm in part, and reverse and remand in part.

I

Gross and Mohwish were convicted as accomplices for causing the Union Bank & Trust Co. to violate the CTRA. Federal regulations require financial institutions to file a currency transaction

report for each cash transaction of more than $10,000. 31 CFR § 103.22(a). In addition, 31 U.S.C. § 5322 makes it a criminal offense to knowingly violate section 103.22(a). The CTRA originally applied only to financial institutions.[1]

Gross and Mohwish used their respective businesses to prevent detection of drug sales and to avoid the CTRA. Mohwish periodically directed Season Sash's controller to make interest payments to Gross. Gross would then deposit these checks and return the funds to Mohwish, Patrick, or one of the companies under Mohwish's control.

Gross instructed his bookkeeper to put less than $10,000 on each deposit slip. The records show seventeen trans-

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1. The CTRA has since been amended to encompass depositors. See 31 U.S.C. § 5324.

actions in which Gross received a large cash payment from Mohwish or one of his companies. For each payment, there is an equivalent deposit into Gross's bank account and, shortly thereafter, a check issued to Mohwish, or an interest he controls, for an identical or similar amount.

As depositors, Gross and Mohwish could not be held directly liable for violating the CTRA. Instead, they were charged as accomplices under 18 U.S.C. § 2(b) for causing Union Bank & Trust to fail to file a currency transaction report. 31 U.S.C. § 5322.

A violation of sections 5313 and 5322 requires a knowing failure to report. Currency transactions are structured to prevent the financial institution from becoming aware of its reporting obligation. Consequently, the financial

institution does not itself knowingly violate the reporting requirement and cannot be held criminally liable. Since the principal, the financial institution, did not commit a crime, the customer who structures transactions cannot be held criminally liable as an accomplice for aiding, abetting, or causing a crime. United States v. Gimbel, 830 F.2d 621, 624- 26 (7th Cir. 1987); United States v. Larson, 796 F.2d 244, 246-47 (8th Cir. 1986); United States v. Reinis, 794 F.2d 506, 507 (9th Cir. 1986); United States v. Anzalone, 766 F.2d 676, 682-83 (1st Cir. 1985).

However, accomplice liability exists where the financial institution or an employee has knowledge of the structuring, even though the knowledge is not held by an employee with responsibility for reporting. See United States v.

Hayes, 827 F.2d 469, 472 (9th Cir. 1987). Union Bank & Trust vice-president David Maynard admitted accepting a "temporary" cash deposit of $100,000 without reporting it. Shortly after Maynard returned this money, Gross sent it back to the bank. Gross directed Maynard to issue cashier's checks in this amount and to structure the transaction to avoid the reporting requirement. Maynard complied although he knew it to be illegal.

Count 15 of the indictment charged Gross and Mohwish with causing the bank's failure to file a currency transaction report relating to this transaction. Because Union Bank & Trust acted knowingly, we affirm these convictions. We reverse the CTRA convictions brought under counts 14 and 16-30 because there is no evidence that the principal acted knowingly.

Mohwish and Gross claim that the law against structuring is unconstitutionally vague as applied to them. We join other circuits in rejecting this argument. See, e.g., United States v. Richeson, 825 F.2d 17 (4th Cir. 1987).

Next we consider a challenge brought by Gross, Mohwish, and Patrick to their convictions, under count 13, for conspiracy to violate the CTRA. They allege insufficient evidence of agreement. It is well-settled that "[n]o formal or express agreement is required. The agreement may be inferred from the acts done in furtherance of the conspiracy." United States v. Hitow, 889 F.2d 1573, 1577 (6th Cir. 1989).

Ample evidence of agreement was presented against each defendant. Mohwish periodically stored Patrick's cocaine and managed his financial

affairs. The facts show that Gross frequently laundered cash for Mohwish. Mohwish, in turn, paid Patrick as a Season Sash employee even though Patrick did no work for the company. Gross directed Maynard to process a cash transaction of $100,000 without filing a currency transaction report. This transaction was part of the money laundering operation, an essential element of the drug distribution enterprise. See United States v. Orozco-Prada, 732 F.2d 1076, 1080 (2d Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1984). Therefore, we affirm the convictions of Patrick, Mohwish, and Gross for conspiracy to violate the CTRA.

Gross, Mohwish, and Patrick also assign error to the court's refusal to instruct the jury that they had no duty to file currency transaction reports.

However, the court did inform the jury of relevant statutory provisions placing the reporting requirement on the bank. The jury instructions clearly explained that the defendants could be convicted only if they conspired to cause the reporting requirement to be unfulfilled in violation of 31 U.S.C. § 5322. Under the circumstances, there is no reversible error. See United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986).

II

Patrick and Mohwish appeal their CCE convictions. It is a crime to obtain substantial income by engaging in a continuing series of drug violations "in concert with five or more other persons" whom the defendant has organized, managed, or supervised. 21 U.S.C. § 848; United States v. Davis, 809 F.2d 1194, 1203 (6th Cir.), cert. denied, 483 U.S.

1007, 107 S.Ct. 3234, 97 L.Ed.2d 740 (1987). Patrick and Mohwish deny organizing, managing, or supervising five other persons. The identity of the five persons chosen by the jury need not be unanimously agreed upon. United States v. English, 925 F.2d 154, 157-59 (6th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 2810, 115 L.Ed.2d 983 (1991). However, there must be five persons who a jury could have found were organized, managed, or supervised by each defendant. Davis, 809 F.2d at 1204.

The first potential CCE scenario involves the extensive drug distribution operation of William Lawson. The evidence overwhelmingly proved that Patrick was one of Lawson's suppliers. But the mere existence of a buyer-seller relationship, without more, is insufficient to prove organization, management,

or supervision. See, e.g., English, 925 F.2d at 157; United States v. Butler, 885 F.2d 195, 201 (4th Cir. 1989). There is no evidence of anything beyond a buyer-seller relationship between Patrick or Mohwish and Lawson. Neither Patrick nor Mohwish was involved in organizing Lawson's enterprise. They did not dictate Lawson's prices, customers, or territory. Thus, neither Patrick nor Mohwish organized, managed, or supervised Lawson or any of Lawson's underlings.

A second CCE scenario points to Kathy Mohwish. Kathy was acquitted of conspiring to distribute drugs and launder money. One element of a CCE violation is that the defendant act "in concert with" the person organized, managed, or supervised. The phrase "in concert with" has been interpreted as requiring an agreement or conspiracy.

See United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983), cert. denied, 469 U.S. 817, 105 S.Ct. 86, 83 L.Ed.2d 33 (1984); cf. Jeffers v. United States, 432 U.S. 137, 148-50, 97 S.Ct. 2207, 2214-16, 53 L.Ed.2d 168 (1977). Since Kathy was acquitted of conspiracy, neither Joseph Mohwish nor Bill Patrick could have acted in concert with her.

The government contends that Patrick's and Mohwish's interactions with other parties also raise the CCE specter. For example, a building contractor named Raymond Butler took cash for work performed at Season Sash. Elmer Haas sold his Florida condominium to Mohwish and accepted a substantial part of the $170,000 purchase price in cash. Gross's bookkeeper, Jean Smith, complied with instructions to avoid making cash deposits over $10,000.

The prosecution presented no evidence that Butler, Haas, or Smith had any knowledge of either the drug distribution or the money laundering activity, much less that they agreed or conspired with Patrick or Mohwish. Butler, Haas, and Smith were at most "innocent dupes" whose conduct unwittingly advanced the illicit purposes of Patrick, Mohwish, and Gross. This falls short of acting "in concert with" under the CCE. See Jeffers, 432 U.S. at 148 n. 14, 97 S.Ct. at 2215 n. 14.

Eduardo Ruiz also cannot be included. The jury might have inferred that Ruiz was somehow involved in the drug operation, given that Mohwish put him on the payroll of Production Leasing for $1,000 a week, although he would appear only sporadically. This, however, is not enough to satisfy the CCE. In

addition to criminal conduct, the CCE involves a relational element: that of organization, management, or supervision. The record supplies no basis for an inference regarding such a relationship between Ruiz and Mohwish or Patrick. At best, the record supports an inference that Ruiz supplied drugs for the enterprise. A supplier is not ordinarily organized, managed, or supervised by his customers. See United States v. Jerome, 942 F.2d 1328, 1331 (9th Cir. 1991).

A more persuasive CCE possibility concerns the activity of Kenny Patrick, Tommy Lancaster, and Greg Fender. Bill Patrick managed his son, Kenny. On at least one occasion, Kenny acted as a courier for his father by delivering the proceeds of a drug deal between Bill Patrick and Lawson. Kenny and two associates, Lancaster and Fender, also

engaged in the distribution and sale of narcotics. Bill Patrick was acquitted of aiding and abetting this operation. His acquittal as an accomplice, however, does not preclude Patrick's CCE conviction as a manager, supervisor, or organizer of Kenny's operation because inconsistent jury verdicts may not form the basis for setting aside proper convictions on other counts. United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

Our task is to review the sufficiency of the evidence supporting the CCE convictions of Patrick and Mohwish without regard to Patrick's acquittal on the conspiracy charge. Id. at 67, 105 S.Ct. at 477-78. The evidence indicated that Bill Patrick organized his son Kenny's delivery of drug money on one occasion. On another occasion, Kenny

distributed "California cocaine" to Fender at the same time that his father allegedly acquired "California cocaine" from Lawson. Bill Patrick was present when Kenny and Lancaster packaged cocaine in the basement of his house and on one occasion when Kenny received payment from Fender. Viewing this evidence in the light most favorable to the prosecution, we conclude that the jury could infer that Bill Patrick organized Kenny. See United States v. Adamo, 742 F.2d 927, 933-34 (6th Cir. 1984), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985).

It is well established that an organizer is not "necessarily able to control those whom he or she organizes." United States v. Ray, 731 F.2d 1361, 1367 (9th Cir. 1984). Rather, "an organizer can be defined as a person who puts

together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise." United States v. Apodaca, 843 F.2d 421, 426 (10th Cir.), cert. denied, 488 U.S. 932, 109 S.Ct. 325, 102 L.Ed.2d 342 (1988). Here, Bill Patrick controlled Kenny and observed Kenny and Lancaster packaging cocaine in his basement. This is sufficient evidence for the jury to infer that Bill Patrick organized Lancaster through his control over Kenny. "[A]n individual need not have direct communications with participants in order to be their supervisor.... If a defendant personally hires only the foreman, that defendant is still responsible for organizing the individuals hired by the foreman to work as the crew." United States v. Rosenthal, 793 F.2d 1214, 1226 (11th Cir.

1986), cert. denied, 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987).

Lastly, the jury could find that Patrick and Mohwish organized, managed, or supervised Delmus Gross and David Maynard,[2] and that Mohwish organized Patrick. Even if we accept that Patrick and Mohwish each organized, managed, or supervised Gross, Maynard, Kenny Patrick

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2. The CCE applies when parties act in concert to violate the narcotics laws. Gross and Maynard engaged in money laundering. Since this is an integral part of a drug enterprise, a jury is entitled to infer from such conduct a conspiracy to aid and abet the violation of the narcotics laws. See United States v. Orozco-Prada, 732 F.2d 1076, 1080-81 (2d Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1984). Here, Gross was acquitted of conspiracy to violate the narcotics laws but convicted of money laundering. As noted above, however, we review the sufficiency of the evidence supporting inconsistent verdicts separately. Powell, 469 U.S. at 67, 105 S.Ct. at 477-78. We find ample evidence to support the jury's finding that Gross's conduct was taken "in concert with" Mohwish's and Patrick's violation of the narcotics laws.

and Lancaster, this yields only four such persons for Patrick, too few to sustain a conviction under the CCE. We therefore reverse the CCE conviction of Bill Patrick.

Although the government contends that Patrick and Mohwish organized each other, the evidence indicates that it was Mohwish, who owned or controlled the corporations, supervised the money laundering, and received a larger share of the proceeds, who controlled Patrick. Counting Gross, Maynard, Bill Patrick, and through him, Kenny and Lancaster, Mohwish controlled five individuals. Accordingly, we affirm Mohwish's CCE conviction.

III

We next consider the third party challenge to the forfeiture order entered pursuant to Mohwish's CCE conviction.

Under 21 U.S.C. § 853(n)(2), third parties must file a petition within thirty days of notice of the forfeiture order. Section 853(n)(4) directs that, if practicable, the hearing should be held within 30 days of the filing of the petition. Section 853(k) bars all intervention not taken pursuant to section 853(n). However, section 853(h) allows a third party to stay the forfeiture if proceeding with it would irreparably harm the petitioner.

The verdict against Gross, Mohwish, and Patrick was returned on August 24, 1989. On September 11, 1989, the court issued seizure warrants for the properties indicated in Counts 1 and 2 of the indictment. On September 28, 1989, Kathy Mohwish filed a Third Party Interest Petition to challenge the seizure. The next day, Sue Bell Sheets and Kathy

Mohwish, as trustee for the Joseph Allen Mohwish II Trust, filed Third Party Interest Petitions. These petitions were also signed by Frank DeSalvo, attorney for Joseph Mohwish. A hearing on the petitions was scheduled for November 3, 1989. When the petitions of Mohwish and Sheets were called, DeSalvo withdrew the petitions on their behalf. On May 9, 1990, petitioners filed a motion to reinstate their third party petitions. The court denied these motions on January 29, 1991.

Petitioners argue that the government is estopped from proceeding with the forfeiture action. On August 28, 1989, attorney DeSalvo stated, "it's my understanding that an appeal would suspend any seizures until completion of that appeal and I want the record to reflect that we fully intend to appeal the verdict of the

jury both as to guilt and particularly as to guilt of Count 1 and as to forfeiture." This statement does not support the petitioners' estoppel argument. Petitioners contend the November 3 withdrawal of their petition was made in the belief that the appeal stayed the forfeiture. Further, they contend that because neither the district court nor the assistant U.S. attorney corrected this erroneous belief when DeSalvo expressed it, the government is estopped from proceeding with the forfeiture. The district court rejected this argument and refused to reinstate the petitions.

This finding can only be reversed if it was an abuse of discretion. See United States v. One 1972 44' Striker, Bonanza, 753 F.2d 867, 869 (11th Cir. 1985). The district court found that since the petitioners knew to file a

petition within thirty days, they were aware that the petition was required to allow them to intervene in the action. This finding was not an abuse of discretion. Moreover, parties who assert estoppel must prove that their reliance was induced. See Restatement (Second) of Contracts § 90 (1979). There is no evidence of inducement here.

The Seventh Circuit has established a procedure for forfeiture cases where, due to procedural considerations, the trial court did not conduct a hearing on the merits. In such cases, the trial court is to conduct an independent review of its forfeiture order. United States v. De Ortiz, 910 F.2d 376, 384 (7th Cir. 1990). The court here conducted such a review and concluded that "these petitioners have no right to any interests in the properties." This finding is not

clearly erroneous. See United States v. Reckmeyer, 836 F.2d 200, 204 (4th Cir. 1987).

Petitioners also wish to stay the forfeiture proceedings. 21 U.S.C. § 853(h) allows this if they can show that they would otherwise suffer irreparable harm, injury, or loss. The provisions of section 853(k), which bar intervention other than under section 853(n), do not apply to section 853(h) because section 853(h) only stays the forfeiture proceedings. However, there is no reason to stay the forfeiture proceedings here because we affirm Mohwish's CCE conviction and because we uphold the district court's finding that the petitioners have no valid claim to the forfeited property.

IV

Gross, Mohwish, and Patrick identify juror misconduct as the basis for chal-

lenging the denial of their motion for a new trial. Denials of a motion for new trial will be upheld absent abuse of discretion. Budoff v. Holiday Inns, Inc., 732 F.2d 1523, 1525 (6th Cir. 1984). The defendants submit that juror Cunningham responded inappropriately to several questions posed to the venire panel, thereby withholding information the questions were designed to elicit. This allegedly led to a Sixth Amendment violation by depriving the defendants of the ability to exercise intelligently their peremptory challenges.

A prospective juror's failure to disclose material information is grounds for a new trial if it demonstrates bias. McCoy v. Goldston, 652 F.2d 654, 658-59 (6th Cir. 1981). If a juror is found to have deliberately concealed material information, bias may be inferred. If,

however, information is not concealed deliberately, the movant must show actual bias. Cunningham v. Sears, Roebuck & Co., 854 F.2d 914, 916 (6th Cir. 1988).

The venire panel was read a list of witness names and instructed to notify the court of any acquaintances on the list. Juror Cunningham did not respond when "James Dennis of Clay City" was read. After Dennis testified, Cunningham told another juror that he recognized him and that Dennis sold insurance. When asked why he did not respond during voir dire, Cunningham said he knew Dennis only as "James Ed Dennis". Acceptance of this reply was not an abuse of discretion. See Cunningham, 854 F.2d at 916.

The venire panel was also queried about any relatives or close friends in the law enforcement community. Cunningham failed to disclose that his

brother was a deputy jailer and that he was a friend of a deceased former sheriff. Cunningham was unaware of a jailer's involvement with law enforcement. He thought his friendship with the former sheriff was mooted by the latter's death. On these facts it was no abuse of discretion to find that the failure to disclose was not deliberate.

The venire panel's knowledge of or familiarity with Delmus Gross was examined. Cunningham had no personal contact with Gross but knew that his brother had purchased a truck from Gross's car dealership. Cunningham was not required to report incidental family dealings of this kind.

Inquiries were made of the venire panel's dealings with or knowledge of Season Sash. Unbeknownst to Cunningham, his first cousin was employed by Season

Sash. Cunningham testified that he was not aware of his cousin's employment with Season Sash until after the trial. This information could not have been concealed or of consequence to Cunningham's deliberations.

Finally, venire panel members were asked if any close relatives or friends had been a criminal defendant. Cunningham's brother was once charged with possession of gambling records and pled guilty to a misdemeanor. Cunningham first stated that he did not answer because the question asked for a felony, not a misdemeanor. When informed that the question referred to any criminal case, Cunningham responded that he did not think the question applied to a plea bargain. The decision to believe Cunningham does not constitute an abuse of discretion.

Since Cunningham did not deliberately conceal information, bias may not be inferred. For the defendants to receive a new trial, actual bias must be shown. The record discloses no sign of Cunningham's actual bias.

V

The defendants' remaining contentions need not detain us long. The defendants claim they were not told of the identity of several witnesses prior to trial. The denial of a bill of particulars lies within the discretion of the trial court. United States v. Hawkins, 661 F.2d 436, 452 (5th Cir. 1981), cert. denied, 456 U.S. 991, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982). The indictment informed the defendants regarding the subject matter of the testimony and no prejudice resulted. See United States v.

Burt, 765 F.2d 1364, 1367 (9th Cir. 1985).

Patrick and Mohwish moved for severance after the admission of a statement made by Gross. The motion was denied and was not renewed at the close of the evidence. It was thereby waived. United States v. Swift, 809 F.2d 320, 323 (6th Cir. 1987).

Rebecca Johnson testified that her former husband described Patrick as "the big man." Patrick describes this as inadmissible hearsay. The record discloses no objection to either the question or the response. Thus, Patrick has failed to preserve this issue for appeal.

The Brady doctrine requires the prosecution to disclose material exculpatory evidence to a criminal defendant. Brady v. Maryland, 373 U.S. 83, 86-87, 83

S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Patrick claims that the delay in disclosing the fraud conviction of government witness Carroll violated Brady. Delay only violates Brady when the delay itself causes prejudice. United States v. Word, 806 F.2d 658, 665 (6th Cir. 1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1383, 94 L.Ed.2d 697 (1987). Although Carroll's testimony hurt Patrick, no prejudice was proved.

The Jencks Act, 18 U.S.C. § 3500, requires the prosecution to supply the defense with any material statement made by a witness to the government that is signed or otherwise verified by the declarant. Patrick complains that statements made by witness Klein were not timely made available to him. The court offered to recall Klein for further cross examination when his Jencks statements

were disclosed. There is no prejudice from a tardy Jencks disclosure if the court gives the defendant the opportunity, upon disclosure, to recall the witness for cross examination. United States v. Valera, 845 F.2d 923 (11th Cir. 1988), cert. denied, 490 U.S. 1046, 109 S.Ct. 1953, 104 L.Ed.2d 422 (1989).

Patrick also alleges that FBI notes of various witness interviews were undisclosed. The notes were subsequently lost. There is no showing that the notes were verified or adopted by the witnesses and so their Jencks status is unclear. In addition, there is no evidence that the unavailability of these notes was the result of bad faith by the prosecution. See United States v. Vella, 562 F.2d 275, 276 (3d Cir. 1977) (although the government should maintain such notes, there is no prejudice absent bad faith in failing

to do so), cert. denied, 434 U.S. 1074, 98 S.Ct. 1262, 55 L.Ed.2d 779 (1978).

VI

To sum up, the CCE conviction of Bill Patrick is reversed and remanded to the district court with instructions to vacate. The CTRA convictions of Delmus Gross and Joseph Mohwish brought under Counts 14 and 16-30 are reversed and remanded to the district court with instructions to vacate. We affirm in all other respects.

KENNEDY, Circuit Judge, concurring.

I concur in the Court's opinion and write separately only because I would hold that the jury could include Ruiz as one of those organized and controlled by Joseph Mohwish.

APPENDIX C

Nos. 89-6412/6444; 91-5076

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

FILED

UNITED STATES of America,
Plaintiff-Appellee, **JUL 6 1992**

v. **LEONARD GREEN, Clerk**

JOSEPH A. MOHWISH
Defendant-Appellant.

ORDER

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

Supreme Court of the United States

No.
A-253

Joseph A. Mohwish,
Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 4, 1992.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 24th
day of September, 1992.

Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No. 92-982

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH A. MOHWISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction for conducting a continuing criminal enterprise.

2. Whether petitioner had adequate notice that structuring deposits in collusion with a bank official so as to avoid currency transaction reporting requirements was illegal.

3. Whether petitioner's conviction for drug conspiracy, in violation of 21 U.S.C. 846, should be vacated after the affirmance of his conviction for conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-982

JOSEPH A. MOHWISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B34) is reported at 965 F.2d 1390.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 6, 1992. Pet. App. C1-C2. On September 24, 1992, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 4, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of engaging in a continuing criminal enterprise (Count 1), in violation of 21 U.S.C. 848; conspiring to distribute cocaine and marijuana (Count 2), in violation of 21 U.S.C. 846; conspiring to file false currency transaction reports (CTRs) and income tax returns, to conduct financial transactions involving proceeds of the sale of controlled substances, and to engage in monetary transactions in criminally derived property, in violation of 18 U.S.C. 371 and 31 U.S.C. 5313, 5322, and 5324(3); 17 counts of failing to file CTRs and aiding and abetting such violations, in violation of 31 U.S.C. 5313 and 5322; and three counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent terms of 20 years' imprisonment for the continuing criminal enterprise and drug conspiracy offenses, and concurrent five- and three-year terms of imprisonment on the other counts. The court of appeals reversed all but one of the substantive CTR convictions, but it affirmed all the other convictions and sentences.

1. The evidence at trial showed that petitioner and co-defendant Bill Patrick[1] operated a cocaine and marijuana drug distribution and money laundering business in the Cincinnati, Ohio, area. Patrick obtained the drugs used in the operation and located

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[1] Patrick's petition for a writ of certiorari, No. 92-324, was denied on October 19, 1992, as was a petition filed by another co-defendant, Delmus G. Gross, No. 92-269. 113 S. Ct. 376.

wholesale and retail customers for them. Petitioner coordinated the drug operation with Patrick and stored cocaine for the operation. Petitioner and co-defendant Delmus Gross used Gross's automobile dealership and several corporations owned by petitioner, including a window manufacturing firm known as Season Sash, to launder the proceeds of the drug business and to conceal its profits. Pet. App. B2.

The money laundering was accomplished in the following manner: petitioner periodically had Season Sash's controller make "interest" payments to Gross, mainly in cash. Gross would deposit those payments into his own account and then return the funds by check to petitioner, Patrick, or one of petitioner's corporations. Pet. App. B4. In order to avoid currency transaction reporting requirements, Gross instructed his bookkeeper to deposit less than $10,000 in cash at a time. *Ibid.*; Gov't C.A. Br. 58. On 15 occasions between June 1983 and March 1985, Gross received large cash payments of between $20,000 and $100,000 from petitioner's companies. On each occasion, he deposited the funds in smaller increments into bank accounts he controlled and then shortly afterwards issued a check to petitioner or to one of his companies for a similar amount. Pet. App. B4-B5; Gov't C.A. Br. 31-34.

In December 1983, Gross asked David Maynard, executive vice-president of Union Bank & Trust Co., to keep a $100,000 cash payment from one of petitioner's companies in the bank's safe over the holidays. Maynard returned the cash to Gross after Christmas, and Gross said he would keep it. Instead, Gross telephoned Maynard and said that he was

sending the cash back, that he wanted it to go to one Eddie Ballard, and that he did not want the transaction to be reported. Maynard then obtained 10 cashier's checks for $9,500 each and one cashier's check in the amount of $5,000, made out as Gross had requested. Maynard did not file any CTRs for that transaction. Pet. App. B7; Gov't C.A. Br. 35.

2.a. The court of appeals rejected petitioner's challenge to his conviction for operating a continuing criminal enterprise, in violation of 21 U.S.C. 848(a). Under that statute, the government was required to prove that petitioner obtained substantial income by engaging in a continuing series of drug violations "in concert with five or more other persons with respect to whom [petitioner] occupie[d] a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. 848(c)(2)(A). The court of appeals held that the evidence was sufficient to prove that petitioner supervised bank vice-president David Maynard as well as co-defendants Bill Patrick and Delmus Gross through petitioner's control over the corporations and supervision of the money laundering, and the court further held that the money laundering scheme was a part of a drug conspiracy. Pet. App. B19-B20. The court held that there was also sufficient evidence that, in "controlling" co-defendant Bill Patrick, petitioner "organized, managed, or supervised" (*id.* at B19) two individuals who were controlled by Bill Patrick—Kenny Patrick (Bill Patrick's son) and Tommy Lancaster. *Id.* at B15-B18. The total of five persons—Maynard, Gross, Bill Patrick, Kenny Patrick, and Lancaster—directly or indirectly supervised by petitioner in connection with

drug violations, was sufficient to sustain petitioner's CCE conviction. *Id.* at B20.

b. Petitioner also challenged the validity of his convictions for violating the Currency Transactions Reporting Act, 31 U.S.C. 5313 and 5322. Federal regulations require financial institutions to file a currency transaction report for each cash transaction of more than $10,000, 31 C.F.R. 103.22(a), and Section 5322 makes it a criminal offense knowingly to violate the regulation. The court of appeals noted that at the time of petitioner's offenses the Act applied to financial institutions only. Pet. App. B4. The court observed that, under the version of the statute in effect at that time, if individuals structured currency transactions so as to prevent a financial institution from becoming aware of its reporting obligation, the financial institution would not violate the reporting requirement of the statute. The court ruled that a customer who structured the transactions in those circumstances could not be held criminally liable, because the principal—the financial institution—would not have committed a crime. *Id.* at B5-B6. As a result, the court reversed all but one of petitioner's convictions for causing a bank to fail to file currency transaction reports. *Id.* at B7. The court found, however, that the evidence on one of the substantive CTR counts showed that Gross gave bank vice-president Maynard a "temporary" deposit of $100,000 cash, and then directed Maynard to obtain cashier's checks for less than $10,000 each and not to file a currency transaction report on the transaction. On that occasion, the court reasoned, the bank had acted knowingly, and petitioner and Gross had aided

and abetted a knowing violation of the CTR filing requirement. Accordingly, the court affirmed petitioner's conviction for that violation. *Id.* at B6-B7.

The court of appeals also affirmed petitioner's convictions for conspiring to violate the currency transaction reporting requirements. The court found that there was abundant evidence of an agreement between petitioner, Gross, and Patrick, and that the money laundering operation was an essential feature of the drug business. Pet. App. B8-B9.

ARGUMENT

1. Petitioner argues (Pet. 12-21) that the court of appeals erred in affirming his CCE conviction because the five persons the court of appeals found to have been supervised by petitioner were not specifically identified to the jury as the relevant supervised persons, nor was the jury specifically instructed respecting the indirect supervisory relationship between petitioner and two of the five, Kenny Patrick and Tommy Lancaster. Petitioner contends that the court of appeals has, in effect, affirmed the conviction on a theory never presented to the jury, and he argues that the affirmance is in conflict with this Court's holding in *McCormick* v. *United States*, 111 S.Ct. 1807, 1815 n.8 (1991).

a. The decision of the court of appeals does not conflict with *McCormick*. In *McCormick*, this Court held that the court of appeals erred when it affirmed a conviction of a state legislator for extortion in violation of the Hobbs Act, 18 U.S.C. 1951, on "legal and factual grounds that were never submitted to the jury." 111 S. Ct. at 1814. The jury had been given specific instructions on how to distinguish between

illegal extortion payments and lawful campaign contributions. The court of appeals did not address the validity of those instructions, but instead developed and applied to the evidence its own test for determining whether a payment qualified as a lawful campaign contribution. *Id.* at 1814-1815. This Court stated that "a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance" and that "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *Id.* at 1815 n.8.

There is no inconsistency between the rule applied in *McCormick* and the basis on which the court of appeals affirmed petitioner's conviction for conducting a continuing criminal enterprise. Count 1 of the indictment alleged that petitioner and co-defendant Patrick engaged in a series of violations of 21 U.S.C. 841 and 846 "in concert with at least five (5) other persons with respect to whom Bill J. Patrick and [petitioner] occupied positions of organizers, supervisors and managers." The identity of the persons supervised by petitioner and the supervisory relationship petitioner held was not specified in the indictment or in the jury instructions, but was left to the jury's evaluation of the evidence presented at trial.[2] The court of appeals relied on two common-

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[2] Petitioner asserts (Pet. 13) that a pretrial brief submitted by the government named a number of individuals whom petitioner supervised, and that that list did not include either co-defendant Bill Patrick or Lancaster. The brief to which petitioner refers did not purport to contain an exhaustive list;

sense inferences in identifying the individuals petitioner supervised. First, the court inferred from petitioner's control of the finances of the drug transactions and receipt of the largest share of the proceeds of those transactions that he organized, supervised, or managed other individuals—like Bill Patrick—who participated in the narcotics conspiracy with him. Second, the court inferred that petitioner's organization, supervision, and management of Patrick gave him similar control over those whom Patrick in turn organized, supervised, and managed. Nothing in the jury instructions precluded the jury from drawing similar inferences, and nothing in the court of appeals' opinion suggested that the jury instructions were inaccurate or had to be qualified in any way. Thus, unlike in *McCormick*, the court of appeals affirmed the conviction on a legal and factual theory that was submitted to the jury.

b. Petitioner argues that the decision of the court of appeals conflicts with the Third Circuit's decision in *United States* v. *Rosa*, 891 F.2d 1063, 1065-1067 (3d Cir. 1989). In *Rosa*, the Third Circuit held that "[i]n the absence of important countervailing concerns, * * * the [CCE] defendant should be advised prior to trial of the individuals claimed by the government to be controlled persons." *Id.* at 1066.

In the court of appeals, petitioner did not advance his claim that the district court erred in failing to supply him with a bill of particulars that included a complete list of individuals he was alleged to have

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it merely stated that petitioner directed "numerous individuals * * * including" several specifically identified individuals, "among others." *Ibid.*

supervised, and the court of appeals did not rule on any such claim. There is thus no split in the circuits, and further review to consider a claim that the court of appeals did not pass upon would be unwarranted.

In any event, petitioner could derive no comfort from the Third Circuit's decision in *Rosa*. In *Rosa*, the Third Circuit refused to reverse the defendant's conviction despite the fact that a bill of particulars identifying each individual supervised by the defendant had not been provided. The court held that "a defendant cannot successfully attack the denial of a bill of particulars unless he demonstrates both that the trial court abused its discretion in denying relief *and that surprise or other prejudice resulted from his having been deprived of the requested information* at the pre-trial stage." 891 F.2d at 1067 (emphasis added). Because the defendant in *Rosa* "failed to show or, indeed, to claim a specific surprise or other prejudice" that he suffered from the failure to supply him with an exhaustive bill of particulars naming all of the individuals whom he supervised, the court of appeals affirmed his conviction. *Ibid.* Similarly, petitioner failed in the court of appeals in this case to allege any surprise or prejudice, and even in his petition he does not identify any specific prejudice he suffered as a result of the failure to supply him with an exhaustive bill of particulars on this point.[3] Accordingly, application of the standards articulated

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[3] Petitioner's defense at trial was that he was not involved in a drug conspiracy at all, and in closing argument he never mentioned the five-person requirement or argued to the jury that the prosecution's evidence failed to establish that he supervised five persons. See 18 Tr. 90-125.

in *Rosa* would result in an affirmance of petitioner's conviction.

2. Petitioner also argues (Pet. 22-26) that his conviction for aiding and abetting a violation of the currency transaction reporting requirements violated his right to due process because he did not have fair warning of the criminal nature of his conduct. Petitioner asserts that there is a conflict in the circuits concerning whether, prior to the enactment of Section 5324(3), an individual could be convicted of aiding and abetting a violation of 31 U.S.C. 5313 and 5322 for causing a bank to fail to file a CTR. As we argued in our opposition to the petitions of co-defendants Gross and Patrick, which this Court denied on October 19, 1992 (Nos. 92-269 and 92-324), further review of this issue is unwarranted.

Under 31 U.S.C. 5313, the Secretary of the Treasury has the authority to promulgate regulations requiring participants in a cash transaction with domestic financial institutions to file a report of the transaction. Pursuant to that authority, the Secretary has promulgated regulations requiring financial institutions to file CTRs whenever a customer engages in a cash transaction of more than $10,000. See 31 C.F.R. 103.21-103.29. The regulations do not, however, impose on the customer an obligation to file a CTR.

A number of courts have held that, in light of the failure of the regulations to impose any duty directly on the customer, 18 U.S.C. 2(b) does not impose accessory liability on a customer who structures a transaction to keep the financial institution from learning that the transaction involves more than

$10,000 (and thereby prevents the bank from knowingly violating the CTR statute). See, *e.g.*, *United States* v. *Mastronardo*, 849 F.2d 799 (3d Cir. 1988); *United States* v. *Anzalone*, 766 F.2d 676, 681-682 (1st Cir. 1985); *United States* v. *Larson*, 796 F.2d 244, 247 (8th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758, 762 (9th Cir. 1986). Other courts, however, have held that an individual who structures a cash transaction to keep a financial institution from learning that the CTR requirements are triggered has caused the institution to fail to file the CTR, and thus is liable under the ordinary interpretation of 18 U.S.C. 2(b). See, *e.g.*, *United States* v. *Heyman*, 794 F.2d 788 (2d Cir. 1986), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Meros*, 866 F.2d 1304 (11th Cir. 1989); *United States* v. *Giancola*, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018 (1986); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983).

In a portion of its decision not at issue in this petition, the court of appeals reversed all but one of petitioner's convictions for substantive CTR violations. In reversing those convictions, the court of appeals essentially agreed with petitioner and with the line of authority represented by *Mastronardo*, *Anzalone*, *Larson*, and *Varbel* that, prior to the enactment of Section 5324(3), it was not a crime for an individual to structure cash deposits if the effect of doing so was to keep the bank from learning that the CTR reporting requirement was triggered.

The court of appeals' affirmance of petitioner's conviction on the single remaining CTR count,

however, is consistent with both lines of appellate authority. That count arose out of the transaction that took place after Christmas in 1983 in which Gross returned $100,000 in cash to Union Bank & Trust Vice-President Maynard and specifically directed Maynard not to file a CTR. With respect to that transaction, it was clear that the bank had an obligation to file a CTR and failed to do so, since its officer was aware of the fact that the transaction involved more than $10,000 in cash and yet complied with petitioner's and Gross's scheme. Accordingly, the bank was liable as a principal for its violation of 31 U.S.C. 5313 and 5322, and petitioner was liable as an aider and abetter. His conviction on that count is not called into question by *Mastronardo*, *Anzalone*, *Larson*, or *Varbel*, and there is thus no conflict among the circuits concerning the validity of that conviction.

In any event, the conflict in authority on which petitioner attempts to rely is of no continuing importance. As petitioner notes, Congress has amended the currency transaction reporting statute to render structured transactions illegal, regardless of whether the financial institution itself knowingly violated the statute. See Money Laundering Control Act of 1986, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18 to 3207-39. One of the purposes of the new Act was to overrule the decisions in *Anzalone* and *Varbel*, and to codify the position of the Eleventh Circuit in *Tobon-Builes*. Section 1354 of the Act (100 Stat. 3207-22), entitled "Structuring Transactions to Evade Reporting

Requirements Prohibited," created a new Section 5324 of Title 31, which provides in pertinent part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. The legislative history specifically states that Congress intended to codify the Eleventh Circuit's pre-1986 position, under which petitioner is clearly liable. S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986). Thus, even if this case implicated the conflict in the circuits concerning the pre-1986 currency reporting statute, further review to resolve that conflict would not be warranted.

3. Finally, petitioner argues (Pet. 26-27) that the court of appeals erred by failing to vacate his conviction for drug conspiracy in violation of 21 U.S.C. 846 (Count 2) after affirming his conviction for the CCE offense (Count 1). On appeal, petitioner argued that, under *Jeffers* v. *United States*, 432 U.S. 137, 154-158 (1977), his conviction for drug conspiracy

in violation of 21 U.S.C. 846, on which he had received a sentence concurrent with his sentence for the CCE violation, must be vacated in light of his CCE conviction. The government agreed that upon petitioner's valid CCE conviction, the drug conspiracy conviction should be vacated. Gov't C.A. Br. 46-47. The court of appeals, however, did not address that issue and instead affirmed petitioner's drug conspiracy conviction.

As we explained in our brief in opposition to the petition for certiorari in *Fernandez* v. *United States*, cert. denied, 111 S. Ct. 2249 (1991) (No. 90-7210), Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See *Garrett* v. *United States*, 471 U.S. 773, 794 (1985); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion). The Sixth Circuit, like a number of other courts of appeals, has determined that a drug conspiracy conviction should thus be vacated when the defendant is also convicted on a CCE count. See *United States* v. *Davis*, 809 F.2d 1194 (6th Cir. 1987); *United States* v. *Schuster*, 769 F.2d 337, 344-345 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986).[4] Ac-

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[4] See also *United States* v. *Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989); *United States* v. *Butler*, 885 F.2d 195, 201-202 (4th Cir. 1989); *United States* v. *Possick*, 849 F.2d 332, 341 (8th Cir. 1988); *United States* v. *Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); *United*

cordingly, although some courts have determined that the conspiracy conviction need not be vacated in those circumstances, at least so long as the defendant is not subjected to any additional punishment as a result of the drug conspiracy conviction,[5] we agreed in the court of appeals that, once petitioner's CCE conviction was affirmed, his drug conspiracy conviction could be vacated even though he received a concurrent sentence on the conspiracy count. See Gov't C.A. Br. 46-47.

The Sixth Circuit did not expressly address petitioner's claim that his drug conspiracy conviction should be vacated, and because that claim was unopposed and was meritorious under Sixth Circuit law, it appears that the Sixth Circuit's affirmance of petitioner's conviction on the conspiracy count was a mere oversight. When petitioner's case is otherwise final in all respects, petitioner may file an appropriate motion in the district court to vacate his sentence on the conspiracy count. In the meantime, petitioner will not be prejudiced by the additional judgment of

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States v. *Dickey*, 736 F.2d 571, 596-597 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); *United States* v. *Jefferson*, 714 F.2d 689, 703 & n.28 (7th Cir. 1983); *United States* v. *Smith*, 703 F.2d 627, 628 (D.C. Cir. 1983); *United States* v. *Webster*, 639 F.2d 174, 182 (4th Cir.), cert. denied, 454 U.S. 857 (1981).

[5] See, *e.g.*, *United States* v. *Fernandez*, 916 F.2d 125 (3d Cir. 1990) (affirming convictions for drug conspiracy and CCE); *United States* v. *Bond*, 847 F.2d 1233, 1238-1239 (7th Cir. 1988) (permitting concurrent sentences to be imposed for drug conspiracy and CCE); *United States* v. *Aiello*, 771 F.2d 621, 632-635 (2d Cir. 1985) (combining drug conspiracy and CCE convictions and imposing a single sentence for both).

conviction on that count, since he will be serving a 20-year, non-parolable term of imprisonment for the CCE offense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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